(2)

No. 85-898

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GERALD M. GEIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the conservator of a fugitive's estate may intervene in an action seeking forfeiture of certain of the fugitive's assets.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bonahan v. *Nebraska*, 125 U.S. 692	4
Broadway v. *City of Montgomery*, 530 F.2d 657	4
Conforte v. *Commissioner*, 692 F.2d 587, stay denied, 459 U.S. 1309	3, 4, 6
Doyle v. *United States Department of Justice*, 668 F.2d 1365, cert. denied, 455 U.S. 1002	4
Estelle v. *Dorrough*, 420 U.S. 534	4
Johnson v. *Laird*, 432 F.2d 77	8
Molinaro v. *New Jersey*, 396 U.S. 365	2, 3, 4, 6
Pepper v. *Litton*, 308 U.S. 295	7
Schuster v. *United States*, 765 F.2d 1047	4
Smith v. *United States*, 94 U.S. 97	4
United States ex rel. Bailey v. *United States Commanding Officer of the Office of the Provost Marshal*, 496 F.2d 324	4
United States v. *Brock*, 747 F.2d 761	7
United States v. *Eighty-Three Thousand Three Hundred Twenty Dollars ($83,320) in United States Currency*, 682 F.2d 573	5, 7, 8
United States v. *Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in United States Currency*, 739 F.2d 792	5, 7
United States v. *Sharpe*, No. 83-529 (Mar. 20, 1985)	4, 8
United States v. *Snow*, 748 F.2d 928	8

Statute and regulations	Page
21 U.S.C. 881 (a) (6)	2, 6
19 C.F.R.:	
Section 162.31	6
Section 162.63	6
21 C.F.R. 1316.75	6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-898

GERALD M. GEIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 769 F.2d 583. The orders of the district court (Pet. App. A33-A39, A40-A48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1985. The petition for a writ of certiorari was filed on November 19, 1985. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's brother, Lewis Geiger, was arrested on April 22, 1983, following a search of his home that uncovered large quantities of cocaine. Law enforcement officials seized assets discovered in the home, including $130,000 in United States currency as well as gold and silver coins and ingots, that they believed to be proceeds of illegal narcotics transactions and therefore subject to forfeiture pursuant to 21 U.S.C. 881(a)(6). Lewis was released on a $150,000 surety bond secured by petitioner and petitioner's wife. Pet. App. A2-A3, A4.

The government initiated forfeiture proceedings in June and July 1983 in the United States District Court for the Southern District of California. Lewis and his girlfriend contested the forfeiture. In December 1983, however, Lewis, having been found guilty of numerous federal narcotics offenses, failed to appear for his sentencing. The district court declared that the surety bond was forfeited and later entered judgment on default of the forfeited bond against petitioner and his wife. Pet. App. A3-A6.

In May 1984, the government moved for summary judgment in the asset forfeiture action. Petitioner, who had secured an appointment as conservator of his fugitive brother's estate under state law, moved to intervene in the proceedings. The district court denied the motion. Pet. App. A33-A39. Relying on the fugitive disentitlement doctrine enunciated by this Court in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), the district court ruled that Lewis Geiger could not contest the forfeiture in light of his fugi-

tive status and that petitioner, "as conservator of his brother's estate, stands in the shoes of his absent sibling" and therefore is similarly disentitled from intervening. Pet. App. A38. The district court did, however, permit Lewis's girlfriend and former attorneys to contest the forfeiture. See *id.* at A44-A45. After finding that the government's evidence was "more than sufficient to constitute the probable cause necessary to justify forfeiture of property under 28 U.S.C. § 881(a)(6)" (Pet. App. A46), the district court entered summary judgment in favor of the government. *Id.* at A40-A51

2. The court of appeals affirmed. Pet. App. A1-A32. The court of appeals noted (*id.* at A15) that it had previously applied the *Molinaro* disentitlement doctrine to civil proceedings in *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982), stay denied, 459 U.S. 1309 (1983) (Rehnquist, Circuit Justice), and it concluded that "the limited extension of that doctrine to this situation is compelled as a matter of sound policy." Pet. App. A19. The court of appeals reasoned that petitioner's claim as conservator "is solely derivative of any claim or defense that Lewis may maintain," and that because "the fugitive is deprived of presenting any claim or defense in this action as the result of his fugitive status, the conservator of his estate must suffer the same consequences when he seeks to advance the same claim or defense." *Ibid.* The court concluded that this result would not prejudice any claimant's interests, since Lewis "can terminate his fugitive status and present his own defense" if he so desires (*id.* at A20), and assignees or creditors of the estate—including petitioner—are free to intervene in forfeiture proceedings on their own behalf. *Id.* at A24-A27.

ARGUMENT

The decision of the court of appeals is plainly correct and warrants no further review. This Court has consistently held that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Estelle* v. *Dorrough*, 420 U.S. 534 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876); see also *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 5-6 n.2; *id.* at 2-3 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is "based on the equitable principle" (*Sharpe*, slip op. 6 n.2) that a litigant brings such disentitlement "upon himself by his Janus-like conduct in seeking to invoke the processes of the law while flouting them" as a fugitive from justice. *United States ex rel. Bailey* v. *United States Commanding Officer of the Office of the Provost Marshal*, 496 F.2d 324, 326 (1st Cir. 1974).

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims by criminal case fugitives. See, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle* v. *United States Department of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982) (Freedom of Information Act proceeding); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of

appeals have applied disentitlement doctrine to civil proceedings "on a number of occasions" and the Court has "denied certiorari in this type case in the past"). Like the court of appeals here, the Second Circuit has ruled, consistently with these cases, that fugitives may not invoke the judicial process to challenge the forfeiture of assets acquired in connection with their criminal activity. *United States* v. *Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in United States Currency*, 739 F.2d 792, 797-798 (1984).

As petitioner (Pet. 19) and the court of appeals (Pet. App. A16) note, however, the Sixth Circuit has permitted a fugitive to appear in a forfeiture proceeding. *United States* v. *Eighty-Three Thousand Three Hundred Twenty Dollars ($83,320) in United States Currency*, 682 F.2d 573, 575-576 (1982). The court of appeals in *$83,320* concluded that the fugitive should be permitted to contest the forfeiture not to protect his own interests but because innocent third parties such as creditors might have claims to the subject assets. The Second Circuit correctly disposed of this contention in *$45,940*, reasoning that the fugitive's own disentitlement does not preclude other claimants from appearing and asserting their own interests in the property. 739 F.2d at 797.

Similarly, the court below limited application of the disentitlement doctrine to Lewis Geiger, the fugitive, and to petitioner, "the conservator who stood in Lewis' shoes." Pet. App. A24. The court of appeals noted that other persons were allowed to present their claims in this action (*id.* at A24-A25), and it went on to reason that permitting the fugitive (or his representative) to appear would not reasonably further the interests of third parties:

> Clearly, the individual who stands to gain most by allowing the conservator to intervene is Lewis. Innocent creditors and beneficiaries, if any, would benefit only secondarily. Moreover, mere speculation that innocent third parties might have an interest in the forfeited property is not sufficient t[o] overcome the application of the *Molinaro/Conforte* disentitlement doctrine in this case. Furthermore, the conservator cannot complain[] of lack of notice to other interested parties. The record clearly reflects that individuals with an interest in the property had notice of the forfeiture proceedings. The conservator himself was an individual creditor and could have sought leave to intervene in that capacity.

Id. at A26-A27. The forfeiture statute contemplates that any third party with an ownership interest in the property may appear in the action to protect his rights. See 21 U.S.C. 881(a)(6).[1] Given the ability of third parties to protect themselves—and the fact that a fugitive or conservator, if he did appear, would not necessarily enjoy the same defenses as would other claimants—there is no reason to construct an exception to the *Molinaro* doctrine to permit fugitives access to the judicial process in this context. See *Conforte* v. *Commissioner*, *supra* (barring fugitive from challenging tax deficiency but permitting his wife to do so). The only person to benefit in such circumstances would likely be the fugitive himself.[2]

---

[1] Contrary to petitioner's suggestion (Pet. 18), notice to potential claimants is provided in narcotics asset forfeiture proceedings. See 19 C.F.R. 162.31, 162.63; 21 C.F.R. 1316.75.

[2] The fact that petitioner is the conservator rather than the fugitive is immaterial because he stands in the shoes of the

For a number of reasons, we do not believe that this resolution of the conflict between the decision below and *$83,320* is warranted at this time. In the first place, the Sixth Circuit has not yet had the opportunity to reconsider its brief discussion of the disentitlement doctrine in light of the reasoning of the Second Circuit in *$45,940* and the court of appeals in this case.[3] Moreover, the conflict is of little practical consequence. In *$83,320* itself, the court of appeals ruled for the government on the merits.[4] Despite the

---

fugitive in all respects. Pet. App. A19, A24. While petitioner argues (Pet. 18-19) that he has a duty under state law to defend the property of the estate, he points to no authority for the proposition that he would be able to assert more extensive rights or would be subject to different duties in connection with the forfeiture proceeding than his brother would be. In fact, the fugitive presumably would have the same obligations as the conservator to preserve his assets for claims of creditors and other beneficiaries. Cf. *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939). Moreover, the court of appeals' holding bars a conservator from intervening only where "he seeks to advance the same claim or defense" as the fugitive. Pet. App. A19. If the conservator could, contrary to our submission, assert a different claim from the fugitive, he would not necessarily be foreclosed from doing so. Finally, distinguishing between the conservator and the fugitive as petitioner suggests would permit a fugitive (someone with a proven propensity for flouting the law) to evade the disentitlement doctrine merely by asserting his interests through the subterfuge of a conservatorship.

[3] Neither the Sixth Circuit nor any other court of appeals has relied on *$83,320* to permit a fugitive or his representative to appear in a forfeiture proceeding. Cf. *United States* v. *Brock*, 747 F.2d 761 (D.C. Cir. 1984) (finding against claimant, who was a fugitive at the time of trial, on the merits without consideration of disentitlement doctrine).

[4] Accordingly, there was no reason for the government to seek further review in that case.

fact that "escapes by persons engaged in the lucrative business of smuggling narcotics are apparently not uncommon" (*Sharpe*, slip op. 2 (Stevens, J., dissenting)), we are not aware of any case in which a fugitive or his representative has successfully challenged a government forfeiture.

Further, this case would be an inappropriate one in which to resolve the conflict because the concern for the rights of third parties on which the Sixth Circuit grounded its decision in *$83,320* is wholly absent here: third parties did appear and their claims were rejected on the merits by the district court. See Pet. App. A46. Moreover, even if petitioner were granted the right to intervene, he has not explained how that would affect the ultimate disposition of the case—the district court found that the government had presented "more than sufficient" evidence to justify the forfeiture (*ibid.*), and petitioner has not suggested how his presence would have changed that finding. Finally, the disentitlement doctrine is equitable and discretionary in nature, resting as it does on the courts' supervisory powers to do justice in each particular case. See, *e.g.*, *United States* v. *Sharpe*, slip op. 6 n.2; *id.* at 2-3, 5 n.16 (Stevens, J., dissenting); *United States* v. *Snow*, 748 F.2d 928, 930 (4th Cir. 1984); *Johnson* v. *Laird*, 432 F.2d 77, 79 (9th Cir. 1970). Accordingly, the courts of appeals may reasonably adopt somewhat different approaches in their application of the doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

DECEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20100